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No. 95-1595

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

MARVIN K. YOUPEE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. 2206, which limits descent and devise of certain minor fractional interests in Indian lands, results in a taking of private property without the payment of just compensation in violation of the Fifth Amendment to the Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Cary G. Youpee, Allen F. Youpee, Helen Youpee Ricker, Darlan D. Youpee and Williamette Y. Bussard were plaintiffs/appellees in the courts below.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 67 F.3d 194. The opinion of the district court (Pet. App. 13a-26a) is reported at 857 F. Supp. 760.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. A petition for rehearing was denied on December 5, 1995. Pet. App. 41a-42a. On February 23, 1996, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 3, 1996. The petition for a writ of certiorari was filed on April 3, 1996, and

was granted on June 3, 1996 (116 S. Ct. 1874). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> [N] or shall private property be taken for public use, without just compensation.

2. Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. 2206, provides:

> (a) Escheat to tribe; rebuttable presumption
>
> No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interests represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of the decedent's death. Where the fractional interest has earned its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

> (b) Escheatable fractional interest
>
> Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.
>
> (c) Adoption of Indian tribal code
>
> Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

STATEMENT

1. Pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and other federal statutes dating back to the end of the 19th century, much of the land on Indian reservations was allotted in trust or restricted status to individual Indians.[1] The allotment

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[1] "[A]llotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ('trust' allotment) or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials ('restricted fee' allotment)." *Felix S. Cohen's Handbook of Federal Indian Law* 615-616 (1982 ed.). For purposes of this brief, there is no distinction between trust allotments and restricted fee allotments. Our references to "trust allot-

acts' intent was to divide tribal landholdings into parcels to be allotted to individual Indians, thereby hastening the development of independent farmers and Indian assimilation into the surrounding non-Indian society. *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987) ("This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to 'speed the Indians' assimilation into American society' ") (citing *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984)).

Under the allotment acts, each member of the tribe typically received a parcel of 160, 80, or 40 acres, depending upon his marital status and age and the type of land involved. The remaining reservation land was to be opened for settlement by non-Indians. General Allotment Act, ch. 119, § 1, 24 Stat. 388. In order to protect the allottees against improvident alienation of their land and to preserve for a generation its tax-exempt status, Section 5 of the General Allotment Act provided that an allotted parcel was to be held in trust for a period of 25 years or such further period as the President might prescribe. 24 Stat. 389. See *United States* v. *Mitchell*, 445 U.S. 535, 540-544 (1980). Although the Act made no provision for devise, it did provide for descent; succession to the allotment interests was determined by Section 5's provision that, if the original allottee should die, the land would continue to be held in trust for "his heirs according to the laws of the State or Territory where such land is located." 24 Stat. 389; see 25 U.S.C. 348. The right of devise was added by the Act of June

---

ments" or "trust lands" should therefore be understood to refer to restricted fee allotments as well.

25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373. See F. Cohen, *Handbook of Federal Indian Law* 220 (1942).

The allotment policy "quickly proved disastrous for the Indians." *Hodel* v. *Irving*, 481 U.S. at 707. As a result of the allotment policy, "Indian land holdings were reduced from 138 million [acres] in 1887 to 48 million in 1934, a loss of 90 million acres." *Felix S. Cohen's Handbook of Federal Indian Law* 138 (1982 ed.). The remaining Indian owners "evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals." *Hodel* v. *Irving*, 481 U.S. at 707. By the early 1900s, Congress began to provide for the extension of the trust period. See, *e.g.*, Act of June 21, 1906, ch. 3504, 34 Stat. 326 (codified at 25 U.S.C. 391). Finally, in 1934, Congress repudiated the allotment policy by enacting the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* See *Mattz* v. *Arnett*, 412 U.S. 481, 496 n.18 (1973). To avoid further alienation of Indian lands to non-Indians, Congress also provided that tribal and individual lands then held in trust would continue in that status indefinitely. 25 U.S.C. 462.

2. One by-product of the allotment policy is what has become known as the "heirship problem." The ordinary incentives to landowners to avoid extreme and uneconomic fractionation of land interests were not present within the allotment system, perhaps because it was intended that, after a relatively brief period, the land would become fully subject to state law. As the House Report on the Indian Land Consolidation Act (ILCA), 25 U.S.C. 2201 *et seq.*, explained:

> Under the[] Allotment Acts, certain Indians received allotments (usually from 80 to 160 acres)

> with a restriction against alienation. If an Indian possessed of an allotment failed to make a will (and most Indians did not make wills), all heirs would inherit a fraction of this allotment. The allotment would then be owned in "undivided" interests because the heirs would own all of the allotment together instead of each person having a specific part of the allotment. In contrast, if the land was owned by a non-Indian in fee, the heirs would have the right to go into state court and ask for the land to be partitioned either for sale or in kind. They would then receive either their share of the proceeds from the sale of the tract inherited, or receive a specific part of the land which they could then sell to whomever they wanted. However, if the tract of land is owned by Indians in trust or restricted fee, courts have interpreted the law as to allow partition only if all the heirs agree to it.

H.R. Rep. No. 908, 97th Cong., 2d Sess. 10 (1982); see also Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* Pt. 1, at 3 (Comm. Print 1960) (*1960 Survey*).

Other incentives that operate to discourage extreme fractionation of land interests also fail to operate in the setting of allotted Indian trust lands. For example, the owners of small interests in non-Indian land must ordinarily organize themselves to see to it that each owner pays a fair share of the state real estate taxes. Such organization is difficult, and the result is often that land with highly fractionated ownership is ultimately sold to pay back taxes. Because Indian lands are not subject to state real estate taxes, however, see, *e.g.*, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168-171

(1973); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), this incentive to avoid fractionation cannot operate.

As the individual interests in allotments passed down through successive generations of the original allottees' descendants, they were therefore splintered into multiple undivided interests, making the property costly to administer and difficult to put to productive use. *Hodel* v. *Irving*, 481 U.S. at 708-709, 712-713. As early as 1934, John Collier, the Commissioner of Indian Affairs, observed:

> [T]he Indian Service is forced to expend millions of dollars a year. The expenditure does not and cannot save the land, or conserve the capital accruing from the land sales or from rentals. * * * For the Indians the situation is necessarily one of frustration, of impotent discontent. They are forced into the status of a landlord class, yet it is impossible for them to control their own estates; and the estates are insufficient to yield a decent living, and the yield diminishes year by year and finally stops altogether.

Readjustment of Indian Affairs: Hearings on H.R. 7902 of the House Comm. on Indian Affairs, 73d Cong., 2d Sess. Pt. 4 , at 117-118 (1934). As this Court remarked in *Hodel*, the extent of fractionation has become "extreme." 481 U.S. at 712.

3. As early as 1928, it had been recognized that a serious problem of land fractionation had developed with respect to individual trust lands. See L. Meriam, Institute for Government Research, *The Problem of Indian Administration* 40-41 (1928). As a start toward resolving those problems, the IRA confined

the descent or devise of restricted lands to the tribe itself, members of the tribe, heirs or lineal descendants of the decedent, and other Indians for whom the United States may hold land in trust. 25 U.S.C. 464. That provision was intended to "make[] a beginning in the solution of the inherited-land problem." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934).

Thereafter, by the Act of November 24, 1942, ch. 640, § 1, 56 Stat. 1021, Congress provided that if an Indian holder of trust or restricted lands or an interest therein has died intestate without heirs, the lands or interest, together with accumulated rents, issues or profits, "shall escheat to the tribe owning the land at the time of allotment" or to a successor tribe. 25 U.S.C. 373a. See H.R. Rep. No. 523, 77th Cong., 1st Sess. (1941); S. Rep. No. 1355, 77th Cong., 2d Sess. (1942).

Ownership of the existing allotted lands, however, continued to splinter, exacerbating the problems recognized in the 1920s. Comprehensive studies of those problems were conducted in 1960 by the responsible committees in both the House of Representatives and the Senate. See *1960 Survey*. Additional hearings were held in 1966. *Indian Fractionated Land Problems: Hearings on H.R. 11113 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. (1966). Congress finally took action to address the problem when it enacted the ILCA, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517 (1983). See *Hodel* v. *Irving*, 481 U.S. at 706-709.

As initially enacted, Section 207 of the ILCA, 25 U.S.C. 2206 (1982), entirely eliminated the inheritability of minor fractional interests in Indian trust

land. The statute provided that undivided interests representing 2% or less of the acreage of a tract and earning less than $100 in the year prior to the owner's death could not pass by devise or descent, but would escheat to the tribe upon the owner's death. In *Hodel* v. *Irving*, this Court held that that provision of the ILCA violated the Just Compensation Clause of the Fifth Amendment. 481 U.S. at 718.

4. In 1984, while *Hodel* v. *Irving* was working its way to this Court, Congress amended Section 207 of the ILCA. The amendment made three changes of significance for present purposes.

First, unlike the original Section 207, which abolished descent and devise of fractional interests even when it would result in consolidation of interests in a parcel of land, the amended Section 207 permits the testamentary devise of a fractional interest in a parcel to someone who already owns an interest in the same parcel. 25 U.S.C. 2206(b).

Second, although the original Act provided for escheat of a fractional interest that represented 2% or less of the acreage in the parcel and "has earned to its owner less than $100 in the preceding year before it is due to escheat," 25 U.S.C. 2206 (1982), the amendment liberalized that provision. Under the amended Act, a 2%-or-smaller interest will escheat only if it is "incapable of earning $100 *in any one of the five years from the date of decedent's death.*" 25 U.S.C. 2206(a) (emphasis added). The amendment further provided that if the interest "has earned * * * less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning

$100 in any one of the five years following the death of the decedent." *Ibid.*[2]

Third, the amended Act provided that, notwithstanding the escheat provision of the ILCA, any Indian tribe could adopt its own code of laws governing the disposition of escheatable interests, subject to the Secretary of the Interior's approval. The Secretary could not, however, approve any tribal code "that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests." 25 U.S.C. 2206(c).

Although Section 207 had already been amended by the time this Court decided *Hodel*, all of the property at issue in *Hodel* had escheated under the original version of the Act. This Court therefore expressly declined to rule on the constitutionality of the amended Section 207. 481 U.S. at 710 n.1. This case squarely presents that issue.

5. Respondents Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, Helen Youpee Ricker, Williamette Y. Bussard, and Darlan D. Youpee are enrolled members of the Sioux and Assiniboine Tribes of the Fort Peck Reservation and are children of William Youpee, who died testate on October 19,

[2] As we explained in our brief in *Hodel* v. *Irving*, at 10 n.10 (No. 85-637), this provision read literally would seem to require that, in order not to trigger the rebuttable presumption, an interest must earn a minimum of $100 in all five of the years preceding the death of the allottee. However, the congressional intent was only to require that the interest earn $100 in at least one of the preceding five years. See 130 Cong. Rec. 31,715 (1984) (remarks of Rep. Udall). We have been informed by the Department of the Interior that it has implemented the amended version of Section 207 in conformity with that construction of the provision.

1990, at the age of 76. Pet. App. 7a, 27a-28a. William Youpee, also an enrolled member of the Fort Peck Tribes, owned undivided interests in allotted trust land on several Indian reservations. William Youpee's will bequeathed his entire interests in one or more allotments to a single devisee; the will therefore perpetuated the existing fractionation, but did not exacerbate it. Respondents were the devisees of those interests. *Id.* at 29a-33a.

On April 28, 1992, following a hearing at which he explained that certain of William Youpee's interests would escheat to various tribes under the amended ILCA, Administrative Law Judge (ALJ) Vernon Rausch in the Department of the Interior issued an order approving Youpee's will and decreeing the partial distribution of Youpee's estate. Pet. App. 27a-40a.[3] In his partial decree, the ALJ ruled that, under the amended ILCA, allotment interests bequeathed to each of the respondents escheated to the tribal governments of the Fort Peck, Standing Rock, and Devils Lake Sioux Reservations, where the allotments were located. *Id.* at 7a, 20a, 36a-39a. That decision was based on BIA certifications that Youpee had a 2% or less undivided interest in each of those allotments, that the allotments could not satisfy the "capable of earning $100 annually" requirement of the amended ILCA, and that the designated devisee was not an owner of an existing interest in that allotment. C.A. Excerpts of Record (E.R.) 18-44. Several interests in allotments left to respondent Helen

[3] Issuance of a final decree was postponed pending the determination of the status of Robert Martin, a Fort Peck Sioux, who claimed that William Youpee was his father. Pet. App. 20a.

Youpee Ricker would have escheated but for the fact that she was already the owner of an interest in those allotments. *Ibid.*[4]

Respondents appealed the decree of partial distribution to the Interior Board of Indian Appeals (IBIA), contending that escheatment of the fractional interests was unconstitutional. On August 25, 1992, the IBIA dismissed the plaintiffs' appeal on the ground that it was without jurisdiction to determine constitutional issues. Pet. App. 7a.

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[4] The only allotment interest bequeathed to Marvin K. Youpee, Sr., escheated, and all four of the allotment interests bequeathed to Williamette Y. Bussard escheated. One of the two interests in allotments bequeathed to Cary G. Youpee escheated. One of the two interests in allotments bequeathed to Allen F. Youpee escheated. The cases of Helen Youpee Ricker and Darlan D. Youpee are more complex. Two of the eight interests in allotments bequeathed to Helen Youpee Ricker escheated; four of the remaining six fractional interests were small enough to have escheated, but they did not escheat because Helen Youpee Ricker already owned an interest in those allotments. See 25 U.S.C. 2206(b); Pet. App. 34a, 37a (referring to interests bequeathed in Clause Fourteenth of decedent's will, including Hugh Eagle Bear, Lame Soldier, Little Head, and Bertha Little Head allotments). With respect to Darlan D. Youpee, the will named him as the devisee of two parcels of land, neither of which escheated. See Pet. App. 30a. He was also named, however, as the residual devisee. See *id.* at 33a. Twenty of the allotment interests that he would have inherited in that capacity escheated, although it appears that at least some additional allotment interests did pass to him as residual devisee. See *id.* at 39a. For purposes of the above calculations, the allotment interests that were bequeathed to the various respondents are described at Pet. App. 29a-33a. The allotment interests that escheated are described at E.R. 18-38, 40-44. For purposes of these calculations, we count the interests in surface and mineral rights to a single allotment as a single interest.

6. On February 5, 1993, respondents filed suit in the United States District Court for the District of Montana against the Secretary of the Interior, alleging that the amended ILCA violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution. The district court acknowledged that the amended ILCA "avoids the escheat of certain interests which may have been escheated under the original ILCA," and, "[t]o that extent, the impact of the regulation is mitigated." Pet. App. 25a. The court also acknowledged that the amended ILCA "corrects the defect [in the original Act] of abolishing devises which would result in consolidation." *Id.* at 23a; see *id.* at 25a. "To that extent," the court continued, "it further promotes the legitimate government interest here of ameliorating fractionation," which the court "agree[d] is a most serious problem." *Ibid.* The court nonetheless found it significant that, because the amended ILCA does not permit the devise of covered fractional interests to lineal descendants who do not already have an undivided interest in the same allotment, it "places many Indian land owners in the [position] of either devising land to a collateral heir or allowing the land to escheat to the tribe." *Id.* at 23a. For that reason, the court held that the amended ILCA violates the Just Compensation Clause, and it enjoined the escheat of the fractional interests at issue. *Id.* at 25a.[5]

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[5] Consistent with our position in *Hodel* v. *Irving*, we do not believe that a cause of action is available against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, to obtain compensation for any taking that might occur in situations like the one presented here. In our brief in *Hodel* v. *Irving*, we noted that the legislative history of the ILCA "strongly reflects Congress's intent that the Act not result

7. The court of appeals affirmed. Pet. App. 1a-12a. Although it agreed that language in *Hodel* v. *Irving* "supports the Government's position that the United States can restrict the descent of fractional interests * * * [and] also suggests that a law requiring a decedent to choose one heir to inherit each fractional interest may be constitutional," *id.* at 11a, the court concluded that the "nature of the Government's regulation of the decedent's land" goes too far by confining the class of eligible devisees to "a very limited group" that, the court believed, "is unlikely to contain any lineal descendants," *id.* at 10a, 11a-12a.[6] The court stated that, because "[t]he amended ILCA restricts descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel," it "continues to completely abolish one of the sticks in the bundle of rights." *Id.* at 12a. The court therefore held that the amended Act violates the Just Compensation Clause.

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in any cost to the United States," and took the position that a cause of action under the Tucker Act therefore is unavailable. Brief for the Appellant at 25 n.16 (No. 85-637). Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019 (1984). The Court apparently agreed, for its holding that the unamended Section 207 violated the Just Compensation Clause necessarily rested on the premise that compensation was not available. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985).

[6] The court did not advert to the fact that one of the respondents—Helen Youpee Ricker—is a child of William Youpee and avoided escheat of several parcels because she already owned an interest in them. See note 4, *supra*.

SUMMARY OF ARGUMENT

The court of appeals held the amended Indian Land Consolidation Act unconstitutional. The amendments to the Act substantially mitigate its impact on an individual Indian's ability to pass property by devise or descent, thereby ameliorating the constitutional defects that this Court found in the original version of the statute in *Hodel* v. *Irving*, 481 U.S. 704 (1987). The court of appeals' decision unduly expands the scope of this Court's holding in *Hodel* v. *Irving*, thereby creating new limits on the historical ability of the United States and other sovereigns to regulate the disposition of property at death without implicating the Fifth Amendment guarantee of just compensation.

In *Hodel* v. *Irving*, this Court examined an earlier version of the statute at issue here using the familiar three-part inquiry that considers the economic impact of the legislation, the investment-backed expectations of the regulated parties, and the character of the governmental action. 481 U.S. at 714. The Court found that the first two factors generally supported the statute's constitutionality and that, in addition, the fact that the statute gave those on whom it imposed costs an average reciprocity of advantage also supported its constitutionality. The Court held, however, that because the character of the legislation included the complete and total elimination of a landowner's ability to dispose of certain *de minimis* property by descent or devise, the amended Act violated the Fifth Amendment's Just Compensation Clause. *Id.* at 716, 718.

The amended Act permits the devise of fractionated interests in allotments that would otherwise escheat,

so long as they are devised to persons who already own an interest in the allotment. As a result of that change, the statute no longer suffers from the defect of entirely eliminating the inheritability of minor fractional interests in allotted trust land. Moreover, the statute's restriction on the inheritability of minor fractional interests is now much more precisely calibrated to the purpose it serves; devise is now permitted precisely in those cases in which it would promote the statutory goal of consolidating minor fractional interests. The amended Act thus remedies the flaws identified by this Court in the original legislation. Moreover, the amended Act is strongly supported by the long-established principle, expressly reaffirmed by this Court in *Hodel* v. *Irving*, that the sovereign has broad authority over the rules of descent and devise. The court of appeals therefore erred in holding Section 207 of the ILCA unconstitutional.

ARGUMENT

SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT, AS AMENDED, DOES NOT RESULT IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION, IN VIOLATION OF THE FIFTH AMENDMENT

I. AS THE COURT RECOGNIZED IN *HODEL* V. *IRVING*, EXTREME FRACTIONATION OF INTERESTS IN ALLOTTED TRUST LANDS IS A GRAVE PROBLEM

In *Hodel* v. *Irving*, 481 U.S. 704, 712 (1987), this Court recognized that the fractionation of Indian lands is "extraordinary and may call for dramatic action to encourage consolidation." That conclusion

was apt. The degree of fractionation, characterized at the time of *Hodel* v. *Irving* as "extreme," *ibid.*, remains extraordinary. Moreover, the difficulties of making productive use of land with such fractionated ownership are so severe, and the costs of maintaining the land interests are so high, that the persistence of such fractionated interests through the generations threatens the reservation communities.

A. In *Hodel* v. *Irving*, this Court discussed the extreme level of fractionation of allotted Indian trust lands. The Court noted that 40-acre tracts on one reservation "are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent." 481 U.S. at 712. The Court adverted to one 40-acre tract that had a value of $8,000 and that produced an income of $1,080 annually. That tract had "439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1." *Id.* at 713. With respect to that tract, "[t]he smallest heir receives $.01 every 177 years," and that heir's interest worked out to a value of $.000418. *Ibid.* Yet the costs of administering the tract were estimated at $17,560 annually. *Ibid.*[7] See also Lawson, *Heirship: The Indian Amoeba*, *reprinted in Hearing on S. 2480 and S. 2663 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 77-104 (1984); Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709, 711-713 (1971).

A 1992 study by the General Accounting Office of land ownership on 12 reservations confirms the

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[7] The Bureau of Indian Affairs (BIA) has informed us that as much as 75% ($33 million) of its 1994 realty budget went to administering fractional interests in allotted lands.

Court's assessment that the problem is extraordinary.[8] For example, on the Wind River Reservation, the largest of those studied, there are 4,228 tracts of allotted land. Of those, one has more than 300 co-owners, 145 have between 101 and 300 owners, 270 have between 51 and 100 owners, 371 have between 26 and 50 owners, 611 have between 11 and 25 owners, and 561 have between three and ten owners. GAO, *Indian Programs: Profile of Land Ownership at 12 Reservations* 9, 14 (Feb. 1992) (*GAO Study*). On the Wind River Reservation, the most fractionated tract of land has 322 owners. *Id.* at 16. The smallest individual ownership interest is .00001 of an 80-acre tract, which is equivalent to an ownership of .35 square feet (or an area 7.1 inches x 7.1 inches) if the land were partitioned. *Id.* at 20. The same pattern exists at most of the reservations studied, including the Fort Peck and Standing Rock Reservations[9]—

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[8] We have lodged copies of the GAO study with the Court.

[9] On the Fort Peck Reservation, there are 6,896 tracts of land. Of those, one has more than 300 co-owners, 31 have between 101 and 300 owners, 179 have between 51 and 100 owners, 422 have between 26 and 50 owners, 987 have between 11 and 25 owners, and 1,447 have between three and ten owners. *GAO Study* 9, 14. The most fractionated tract of land has 345 owners. *Id.* at 16. The smallest individual ownership interest is .00012 of a 40-acre tract, which is equivalent to an ownership of 2.09 square feet (or an area 17.4 inches x 17.4 inches) if the land were partitioned. *Id.* at 20. On the Standing Rock Reservation, there are 9,267 tracts of land. Of those, ten have more than 300 co-owners, 111 have between 101 and 300 owners, 414 have between 51 and 100 owners, 858 have between 26 and 50 owners, 1,640 have between 11 and 25 owners, and 1,958 have between three and ten owners. *Id.* at 9, 14. The most fractionated tract of land has 542 owners. *Id.* at 16. The smallest individual ownership interest is .0000025 of a 320-acre tract, which is equivalent to an ownership of .35 square feet (or an area 7.1 inches x 7.1 inches) if the land were partitioned. *Id.* at 20.

two of the three Reservations on which the land at issue in this case is located.[10]

B. The result of the extreme fractionation of land interests has been the "disuse of millions of acres of real property." *The Indian Amoeba* 77. The difficulties of making productive use of trust allotments with highly fractionated ownership are severe. The economic value of those lands could ordinarily be realized in three ways: by leasing its mineral rights (if any) or leasing the surface estate for farming or grazing purposes, by selling the land, or by the owner's using the land for agriculture or mineral extraction. Each of those possibilities faces serious obstacles where the ownership interests are so highly fractionated.

Leasing the land is a difficult process. Under ordinary principles of property ownership, each owner of an undivided interest in a parcel of land must agree to any lease of that land. That is because each owner of a tenancy in common (the dominant form of co-ownership) "has the right to use and enjoy the entire property as if he were the sole owner," 4A *Powell on Real Property* ¶ 603[1], at 50-15 (June 1996), and a potential lessee therefore cannot obtain the exclusive

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[10] In this case, the interests that would have passed to all respondents, but that instead escheated under the ILCA, range from .05% to 1.67% of the parcel involved, see C.A. Excerpts of Record (E.R.) 19, 40; their average annual income for the preceding five years ranged from zero to $12.55, see E.R. 18, 42; and the estimated value of the escheated interests that have a defined cash value ranged from $2.69 to $333.33, see E.R. 42. See also E.R. 41, 42, 43, 44 (listing parcels whose value is identified only as "nominal").

right to use the property unless the lessee separately obtains that right from each tenant in common. Where literally hundreds of owners may be involved, the difficulty of finding them all and obtaining their consent to a contract of lease can be enormous. The burden is compounded by the fact that among the dozens or hundreds of owners of a trust allotment may be members of a number of different tribes, non-Indians, and children adopted out of the tribe, and that various owners may live off the reservation, in other parts of the United States, or even in Canada. See *The Indian Amoeba* 88. The GAO study confirms the problem. On the 12 reservations studied, there were 36,134 tracts with multiple ownership. Of those tracts, 26 had more than 300 owners, 835 tracts had 101-300 owners, 2,391 had 51-100 owners, 4,944 had 26-50 owners, 9,628 had 11-25 owners, 13,553 had 3-10 owners, and only 4,757 had two Indian owners. *GAO Study* 14. Finally, those owners whose interests are very small are particularly unlikely to respond to mailings or otherwise expend any effort to see to it that the land is managed effectively. See *The Indian Amoeba* 88. Once again, on the 12 reservations included in the GAO study, interests of 2% or less accounted for 431,074 (or more than 60%) of the 704,562 identified ownership interests. *GAO Study* 19.

Under these conditions, obtaining the agreement of numerous owners to agricultural or mineral leases is often impossible. Although the owners of a majority interest in a parcel of land may enter into an agricultural lease without obtaining the consent of all of the owners, 25 U.S.C. 3715(c)(2), even obtaining such majority consent can pose formidable obstacles when the ownership interests are highly fractionated.

Where the land is not in use by any of the owners and the heirs have been unable for a three-month period to agree on a lease, the Secretary of the Interior may enter into leases on their behalf. See 25 U.S.C. 380; 25 C.F.R. 162.2. But that process is cumbersome and the burden on the government is great. As a result of the complexity and lack of flexibility in the process, although leases may ultimately be executed, they may not ensure that given parcels of land are used most efficiently and that their value is realized in the way that the individual owners and their communities would prefer. See *Indian Heirship Land Problem*, 46 Wash. L. Rev. at 718-719.

C. Difficulties with highly fractionated ownership are not unknown in other property law contexts. They are ordinarily resolved, however, "by either physically dividing land among heirs [partitioning], so that each parcel then becomes a separate estate, or selling the property and dividing the proceeds." *The Indian Amoeba* 78.[11] Neither of those alternatives,

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[11] Under ordinary legal principles applicable to lands not held in trust for Indians, "[e]very tenant in common has an inherent right to compel partition." 4A *Powell on Real Property*, *supra*, ¶ 607[1], at 50-43. See also *id.* at 50-43 n.3 (compiling state partition statutes). Although property is sold only when the tenants in common agree or when partition in kind would be prejudicial to their interests, *id.* ¶ 607[4], at 50-54 to 50-55, "[m]ost partitions today are * * * in the form of sale and division of the proceeds," *id.* at 50-58. A typical statutory scheme governing partition is that of Montana, where the decedent in this case resided. Any tenant in common may bring an action for partition. Mont. Code Ann. § 70-29-101 (1995). If "the property or any part is so situated that the partition cannot be made without great prejudice to the owners, the court may order a sale thereof." Mont. Code Ann. § 70-29-202(1) (1995). The statute provides that, "otherwise,

however, is satisfactory in the case of trust allotments. Sale of the allotment by its owners (which, in any event, requires the approval of the Secretary of the Interior, see, *e.g.*, 25 C.F.R. 152.22), is more difficult even than leasing the tract, because there is no provision for sale of the tract as a whole by the owners of a majority interest. Cf. 25 U.S.C. 379, 404, 483 (referring to sales on behalf of "heirs" or "Indian owners"); 25 C.F.R. 152.17 (providing for sale "by the Indian owner with the approval of the Secretary or by the Secretary with the consent of the Indian owner"). Moreover, in light of the history of the alienation of Indian lands to non-Indians, see p. 4, *supra*, and the purpose of the trust relationship (especially since the passage of the Indian Reorganization Act) to prevent such alienation from occurring, see *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992); S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934), the government is cautious before permitting the sale of parcels of Indian trust lands.

Nor does partitioning the land provide a practical solution. It has generally been assumed that, in the absence of specific statutory authority to the contrary, partition is permissible only with the unanimous agreement of the owners. See, *e.g.*, H.R. Rep. No. 908, 97th Cong., 2d Sess. 10 (1982); Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* Pt. 1, at 3-4 (Comm.

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* * * [the court] must order a partition according to the respective rights of the parties." *Ibid.* If the property is sold, the proceeds of the sale are distributed among the tenants in common, after the amounts necessary to cover the costs of sale and satisfy any liens are deducted. Mont. Code Ann. § 70-29-321 (1995).

Print 1960) (*1960 Survey*). The statutes codified at 25 U.S.C. 372 and 378 grant authority to the Secretary of the Interior to partition trust lands if to do so would be "to the advantage of the heirs." But that authority has been held to be limited by 25 U.S.C. 464, which provides that, with certain exceptions, "no sale, devise, gift, exchange, or other transfer of restricted Indian lands * * * shall be made or approved." See *Sampson* v. *Andrus*, 483 F. Supp. 240 (D.S.D. 1980). In any event, most allotted land is useful only for grazing or mineral exploitation. Partitioning such land into very small parcels that are not economically viable would not appear to be to the advantage of the owners. See *1960 Survey* 8 ("it is not economically feasible, if it ever was, to divide the lands into smaller parcels").

D. The extreme fractionation of allotted lands imposes substantial costs both upon the owners of the tracts involved and upon the community. As the Senate Committee explained when it reported on the amendments to the Indian Land Consolidation Act, among the consequences of the fractionated land ownership pattern are:

> (1) a complex mix of title interests to individual tracts of land, (2) limitations on the ability of individual owners to dispose of their interests in the land, (3) devaluation of individual interests because of inability to convey full title without consent of all of the heirs, (4) loss of control of rental of the property to the BIA because [of] the inability to secure agreement among all of the heirs or even to locate heirs, (5) erosion of interests of tribal members in individual tracts to non-Indian[s] or non-member Indians, (6) inability to

> control the conduct of individual heirs with respect to the property due to inapplicability of laws against trespass or conversion to persons ow[n]ing any undivided interest in property.

S. Rep. No. 632, 98th Cong., 2d Sess. 3 (1984). As a result, allotments owned by numerous heirs often cannot be put to their most economic use, and some tracts are left in a state of quasi-abandonment because of difficulties experienced by the BIA in obtaining agreement of the owners to lease the land. H.R. Rep. No. 908, *supra*, at 10-11, 13. The problem has enormously deleterious consequences for the owners of the property and the community as a whole.

II. THE AMENDED VERSION OF SECTION 207 IS CONSTITUTIONAL UNDER THE *PENN CENTRAL* ANALYSIS EMPLOYED BY THE COURT TO ANALYZE THE ORIGINAL VERSION IN *HODEL V. IRVING*

In *Hodel* v. *Irving*, this Court held that an earlier version of the Indian Land Consolidation Act was unconstitutional because it effected a taking of private property without just compensation. The Court analyzed the provisions of the original Act in accordance with the three-part inquiry derived from *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

A. Economic Impact

The Court in *Hodel* v. *Irving* noted that the original Act's economic impact on property owners "can be substantial," 481 U.S. at 714, since the remainder interest in the property—which is the property interest that goes to the tribe when the escheat takes place—may constitute a substantial

portion of the value of the property, *id.* at 715. Because the amended version of the Act provides further safeguards to ensure that property interests with substantial value do not escheat, the amended Act has a lesser economic impact than did the original version.

The version of the Act before the Court in *Hodel* required escheat of fractional interests of less than 2% that had "earned to its owner less than $100 in the preceding year before it is due to escheat." 481 U.S. at 709. In analyzing the economic impact of that provision, the Court specifically adverted to the possibility that "the failure to 'look back' more than one year at the income generated by the property had caused the escheat of potentially valuable timber and mineral interests." *Id.* at 714. Even very valuable property interests may fail to generate income in a given year, and the original Act's rigid use of a one-year frame of reference could thus exacerbate the economic impact of the escheat.

The amended Act employs a much more flexible standard to ensure that a property interest is genuinely *de minimis* in value before it escheats. The 1984 amendments replaced the rigid $100-in-the-prior-year limitation with a standard that gives rise to a rebuttable presumption in favor of escheat only if the property "is incapable of earning $100 in any one of the five years from the date of decedent's death." 25 U.S.C. 2206(a). See p. 9 & n.2, *supra*. That standard ensures that only interests that are truly minor—and the maintenance of which therefore requires a disproportionately large administrative cost—will escheat.

B. Investment-Backed Expectations

In *Hodel* v. *Irving*, the Court stated that "[t]he extent to which any of [the parties] had 'investment-backed expectations' in passing on the property is dubious," because their interests were "overwhelmingly acquired by gift, descent, or devise," and the land was "generally held for lease rather than improved and used by the owners." 481 U.S. at 715. That continues to be true of the amended Section 207, as the court of appeals in this case concluded, Pet. App. 10a, and it supports the constitutionality of the Act. See 481 U.S. at 715.

C. Character Of The Governmental Action

In *Hodel* v. *Irving*, the Court noted that the "character of the governmental action" had two aspects. First, the fact that there was some "average reciprocity of advantage" when small fractional interests are consolidated in the hands of the decedent's tribe "weigh[ed] weakly in favor of the statute." 481 U.S. at 715. The Court stated that, if the analysis were terminated at that point, the Court "might well find [the unamended] § 207 constitutional." *Id.* at 716. But the fact that the original Act amounted to a "complete abolition," *id.* at 717, of the right to transfer property to individuals of one's choice at death tipped the scales to require a finding of unconstitutionality. The 1984 amendments to the Act substantially remedy the defects in the version of the Act that was before the Court in *Hodel* v. *Irving* by making the right of devise available when it would not result in the perpetuation or exacerbation of the fractionation. In addition, the amended Act gains support from the long-standing principles, reaffirmed in *Hodel* v. *Irving*, that the sovereign possesses very broad

authority over the right of descent and devise—and that Congress's authority as regards inheritance of Indian property is particularly broad. In light of those factors, the character of the governmental action under the amended Act does not warrant a holding that it violates the Just Compensation Clause.

1. *The amended Act continues to provide an average reciprocity of advantage.* The amended Section 207 continues to provide even the owners of fractional shares with the same "average reciprocity of advantage" provided by the original Act. *Hodel* v. *Irving*, 481 U.S. at 715 (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)). As the Court explained in *Hodel*, "[c]onsolidation of Indian lands in the Tribe benefits the members of the Tribe." 481 U.S. at 715. Although not all tribal members own escheatable interests, there is "substantial overlap between the two groups." *Ibid.* In addition, "the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands." *Id.* at 716. The fact that the amended Act continues to offer benefits to those who also must bear its costs cuts in favor of its constitutionality.

2. *The amended Act does not affect the right to use or enjoy property, or the right to dispose of it through sale or gift.* It is of substantial significance in assessing the character of the governmental action to analyze the nature of the property interest that is being affected. The property right affected by Section 207 is not the right to the use or enjoyment of the property itself—or even so much of that right as can be realized by an owner of a 2%-or-less interest that is capable of generating less than $100 of annual

income. Section 207 leaves that right entirely untouched. Nor does Section 207 affect the right of the owner of a fractional interest that is subject to escheat under Section 207 to dispose of that interest by selling it, exchanging it, giving it away, or seeking to have it partitioned.[12] See 25 C.F.R. 152.17, 152.22(a), 152.25, 152.33. Compare *Andrus* v. *Allard*, 444 U.S. 51 (1979) (upholding Act of Congress that eliminated right to dispose of property for consideration). It follows that Section 207 is unlikely to have a substantial effect on the economic value of the fractional property interests it affects—a consideration that is highly relevant to the first prong of the *Penn Central* analysis. Given the variety of ways in which the property can be disposed of, however, it also follows that the character of the governmental action cannot be characterized as even a substantial elimination of the owner's right to dispose of property.

3. *Section 207 does not affect the right to pass the property at death through non-probate means.* The only component of the "bundle of sticks" that is affected by Section 207 is the right of the owner of a fractional interest to see to it that his interest passes at his death to family members or other individuals of his choice who do not already own an interest in the

[12] Because the land is held by the United States in trust, each of those transactions would of course require the approval of the Secretary of the Interior. But that is a consequence of legislation requiring the Secretary to look after the best interests of the owners, and there is no basis for believing that the Secretary's approval would be withheld where a sale, exchange, or gift transaction was genuinely in the best interests of the owner. In any event, Section 207 is separate from the general legal restrictions on alienation of trust lands without the Secretary's consent.

same property. Yet Section 207 does not entirely eliminate even that right. The owner of course retains the ability to acquire whatever additional interest in the tract would bring his total share above the 2% level necessary to avoid escheat. 25 C.F.R. 151.7. The owner also retains the ability to sell the property during his lifetime and transfer the proceeds of that sale to his heirs via descent or devise. More significantly, however, Section 207 affects only the extent to which the owner may use a particular mechanism to transfer his property at death to individuals of his choice—the mechanism of probate.[13]

[13] It may be inaccurate to characterize the amended Act as eliminating the right to transfer property by descent. The effect of escheat to the tribe is simply to designate by statute a particular heir—the tribe—for the minor fractional interests at issue. To be sure, it is unusual for an inheritance statute to designate a non-relative as an heir. But it may well be the case that many or most of the intestate Indians affected by the ILCA—with a lifetime's experience with the problems of extreme fractionation and an appreciation of the benefits of escheat to the tribal community and its members—would choose to leave their minor fractional interests to the tribe. Indeed, many of them may have been relying on the ILCA to do so. That is particularly true of decedents who, during their lifetime, took no part in managing or using the parcels of land in which they had an interest and who derived little or no income from that land. Moreover, it has long been recognized that "Indian lands were communal property" and that "every member of the community is an owner of it as such"—a type of organization of property that is "a thing unknown" elsewhere in this country. *Journeycake* v. *Cherokee Nation*, 28 Ct. Cl. 281, 302-303 (1893), aff'd, 155 U.S. 196, 207 (1894) (land held by Cherokees "as a nation, and no title was vested in severalty in the Cherokees, or any of them"); see also *The Cherokee Trust Funds*, 117 U.S. 288, 309 (1886); *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 745-746 (1835); see generally William Cronon,

The other familiar non-probate means by which individuals see to it that property is passed at death remain intact.

For example, an owner of a fractional interest may still give the interest to a friend or relative while retaining a life estate in order to ensure continued realization of whatever benefits accrue from ownership. 25 C.F.R. 152.25(d). Similarly, the owner may transfer the interest to a revocable trust on behalf of the desired beneficiary, while retaining a life estate. Such a trust may be as simple as a signed writing by the owner stating, "I hereby declare that I hold my fractional interests in [the parcel] in a revocable trust, for my benefit for my life, and on my death the interest is to go to [the beneficiary]." Jesse Dukeminier & Stanley Johanson, *Wills, Trusts, and Estates* 11 (5th ed. 1995); accord Ronald Chester, *Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 Sw. U. L. Rev. 1195, 1209 (1995) (stating that a revocable trust is generally "simpler than a will"). It surely is not inherently more complex than a will, see *Farkas* v. *Williams*, 125 N.E.2d 600 (Ill. 1955) (revocable trust need not be executed with all of the formalities of a will); *Coleman* v. *First Nat'l Bank*, 506 P.2d 86 (Nev. 1973); *Harvey* v. *Vigil*, 430 P.2d 874 (N.M. 1967), and an owner who is concerned about passing a fractional interest to individuals of his choice at his death can

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Changes in the Land 58-81 (1983) (study of concepts of landownership of Indians in eastern United States). That background supports the assumption that individuals with such small interests would not have objected to leaving them to escheat to the Tribe, for the benefit of the community as a whole.

therefore accomplish that purpose without running afoul of Section 207.[14]

4. *The amended Act does not entirely eliminate the right to pass property at death through devise.* Most significantly, unlike the version of the ILCA before the Court in *Hodel* v. *Irving*, the amended Act no longer entirely prohibits devise of minor fractional interests. In *Hodel* v. *Irving*, the Court emphasized that what "goes too far," 481 U.S. at 718 (quoting *Pennslyvania Coal Co.* v. *Mahon*, 260 U.S. at 415), is the "complete" and "total" "abrogation" of all rights of descent and devise.[15]

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[14] This Court in *Hodel* v. *Irving* stated that "[t]he fact that it may be possible for the owners of these [fractional] interests to effectively control disposition upon death through complex *inter vivos* transactions such as revocable trusts is simply not an adequate substitute for the rights [of passing the property by descent and devise] taken." 481 U.S. at 716. Although a revocable trust may not be an adequate substitute where a statute otherwise effects a "total abrogation of the right to pass property," *ibid.*, the availability of this mechanism is at least relevant to an assessment of the rights that are affected by the ILCA. And it may well be an "adequate substitute" for the rights that are affected by the amended Section 207, which no longer entirely eliminates the right to pass the property by devise.

[15] See 481 U.S. at 716 ("the regulation here amounts to *virtually the abrogation* of the right to pass on a certain type of property") (emphasis added); *ibid.* ("Even the United States concedes that *total* abrogation of the right to pass property is unprecedented") (emphasis added); *ibid.* ("this statute *effectively abolishes* both descent and devise") (emphasis added); *id.* at 717 ("a *total* abrogation of these rights cannot be upheld") (emphasis in original); *ibid.* ("*complete* abolition of both the descent and devise of a particular class of property may be a taking") (emphasis added); *ibid.* ("The difference in this case is

The amended Act provides that "[n]othing in this section shall prohibit the devise of * * * an escheatable fractional interest to any other owner of an undivided fractional interest in [the] parcel." 25 U.S.C. 2206(b). It therefore remedies the defect identified by the Court in *Hodel* v. *Irving* by permitting devise of property if the devisee already owns an interest in the same parcel. Indeed, in this very case, that provision operated to permit the devise of otherwise escheatable interests to respondent Helen Youpee Ricker because she already owned interests in the same property. See note 4, *supra*. In other cases, it would permit the devise of an escheatable interest to a number of persons, including—in the ordinary case—many relatives who can be expected to have fractional interests in the same allotments that have passed within a given extended family by inheritance from the original allottee.

Moreover, the specific context in which the amended Act permits devise is highly significant. In *Hodel* v. *Irving*, the Court concluded that the failure to fit the means to the end was a serious defect in the unamended Section 207. Specifically, the Court distinguished the case before it from others in which a legislature had acted to alter the rules of descent and devise by noting that "[t]he difference in this case is the fact that both descent and devise are completely abolished; indeed they are abolished *even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property*." 481 U.S. at 717-718 (emphasis added);

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the fact that both descent and devise are *completely* abolished") (emphasis added).

see also *id.* at 716 (noting that the unamended Act abolishe[d] descent and devise "even when the passing of the property to the heir might result in consolidation of property—*as for instance when the heir already own[ed] another undivided interest in the property*") (emphasis added).

By permitting devise precisely in those circumstances in which the statutory goal can be served—and eliminating it precisely in those circumstances in which the extreme fractionation would be perpetuated or exacerbated—the amended Section 207 avoids the defects of the unamended Act before the Court in *Hodel* v. *Irving*. In doing so, it gains support from the long line of cases that have recognized that it is consistent with the Just Compensation Clause for a legislature to exercise its broad authority to affect property interests where those interests have adverse effects on other owners of the property and others in the community. See, *e.g.*, *Penn Central Transportation Co.* v. *New York City*, 438 U.S. at 125-127; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). Although the unamended Act affected property interests more than was necessary to accomplish its goal, the amended Section 207 requires escheat of minor fractional interests only where permitting their descent or devise would perpetuate or exacerbate the grave social and economic problems caused by the existence of those minor fractional interests. Conversely, it permits devise where the effect would be to consolidate fractional interests and thereby contribute to elimination of those serious problems. The fact that Section 207

is now so carefully tailored to remedying the problem it addresses supports its constitutionality.[16]

5. *The amended Act's limitation on the right to dispose of property by devise is supported by the established principle that the sovereign has substantial authority to regulate the laws of inheritance.* The Court in *Hodel* v. *Irving* carefully "reaffirm[ed] the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 717. To hold the amended Act unconstitutional would contravene the principles underlying those cases and cast doubt upon a number of hitherto common practices that limit an

[16] The amended Act fares better than the version in *Hodel* v. *Irving* in another respect as well—albeit one on which the Court did not rely. As Justice Stevens pointed out in *Hodel* v. *Irving*, the original version of the Act "became effective the day it was signed into law"—January 12, 1983. 481 U.S. at 732 (Stevens, J., concurring in the judgment). Since the decedents in *Hodel* v. *Irving* died in March, April, and June, 1983, it was "not reasonable to assume that [the] decedents * * * had anything approaching a reasonable opportunity to arrange for the consolidation of their respective fractional interests with those of other owners." *Id.* at 732-733. By contrast, the decedent in this case had approximately six years between the time the amended Act was passed—October 30, 1984, see Pub. L. No. 98-608, § 1(4), 98 Stat. 3172—and his death on October 19, 1990. Accordingly, he had ample opportunity to "put [his] affairs in order," 481 U.S. at 733 (Stevens, J., concurring in the judgment), by making *inter vivos* transfers of his minor fractional property interests (or of remainder interests in those property interests) or otherwise disposing of them (including by devise to a person who already owned an interest in the same tracts), and thereby avoiding escheat.

individual's right to pass property at his death—even among family members.

The authorities from this Court demonstrate the breadth of the sovereign's authority to alter the laws of descent and devise. In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898), for example, in the course of upholding a state inheritance tax, the Court explained that "[t]he right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions on it." Referring specifically to the "natural right in children to inherit the property of their parents," the Court has stated that it "know[s] of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good." *United States* v. *Perkins*, 163 U.S. 625, 628 (1896). And the authority of the government to alter the rules of inheritance extends to devise, as well as descent. The Court has specifically referred to "the power which every * * * sovereignty possesses, of regulating the manner and terms upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance," *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 493 (1850), and has noted that "when [a State] grants [the privilege of passing property through descent or devise], it may annex to the grant any conditions which it supposes to be required by its interests or policy," *id.* at 494. See also *United States* v. *Fox*, 94 U.S. 315, 320 (1876) ("The power of the State to regulate the tenure of real property within her limits * * * and the rules of its descent, and the extent to which a testamentary disposition of

it may be exercised by its owners, is undoubted."); *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874) ("the law of descent and distribution may be moulded according to the will of the legislature" to govern estates of those not yet deceased).

Although the above cases do not specifically cite the Just Compensation Clause, this Court in *Hodel* v. *Irving* correctly understood their reasoning as affirming the sovereign's authority to act in the area of inheritance law "without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 717. Indeed, the cases demonstrate a broad recognition that no constitutional provision protecting property interests would preclude the sovereign from making reasonable adjustments in the law of descent and devise. Thus, in *Randall* v. *Kreiger*, the Court noted that it is only after an individual's death that the rights of the heirs or devisees "become fixed and vested," at which time those rights "rest upon the same foundation, and are protected by the same sanctions as other rights of property." 90 U.S. (23 Wall.) at 148. Presumably, those sanctions include the protections of the Just Compensation Clause. See also *United States* v. *Perkins*, 163 U.S. at 628 (stating that "we know of *no legal principle*" to prevent a legislature "from taking away or limiting" the right of testamentary disposition) (emphasis added).

Indeed, in *Irving Trust Co.* v. *Day*, 314 U.S. 556 (1942), the Court addressed a constitutional attack on a statute permitting a spouse to take a statutory share from an estate, even when that was apparently not the intent of the decedent (as expressed in the decedent's will) and the spouse had signed an antenuptial waiver of rights to the husband's property. The Court swept aside the Contract Clause and Due

Process Clause challenges to the statute in language directly applicable to this case:

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. *Nothing in the Federal Constitution* forbids the legislature * * * to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

Id. at 562 (emphasis added).

Pursuant to that power, States have frequently adjusted the rights of various parties to inherit property, even when such disposition of an individual's estate is directly contrary to the wishes of the decedent. Historically, the rights of dower and courtesy limited the ability to convey property. See 1 *Powell on Real Property* ¶ 109[1], at 6-11 to 6-13 (June 1996). A number of States continue to recognize those rights in various ways. Even under more modern codifications, however, the law imposes substantial restrictions on an individual's ability to pass property to whomever the individual chooses through probate proceedings. For example, the Uniform Probate Code provides that a surviving spouse or minor children are entitled to a "homestead allowance" of $15,000 from the decedent's estate, and that that allowance "is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share." Uniform Probate Code § 2-402 (1996). Where a decedent has an estate of $15,000 or less and is survived by a spouse or minor children, the effect of that provision is to

eliminate entirely *any* right to pass property through devise or descent in any other way or to any other party. Even for larger estates, the provision operates *pro tanto* to remove the authority of the decedent to pass the property it affects in any other way.

The same principle of broad sovereign authority over matters of descent and devise is applicable even to laws that restrict the right to pass property to one's spouse or lineal descendants. Impediments to inheritance such as alien citizenship, see *Clark* v. *Allen*, 331 U.S. 503 (1947); see also *Kolovrat* v. *Oregon*, 366 U.S. 187, 188 (1961), and illegitimacy under some circumstances, see *Shangreau* v. *Babbitt*, 68 F.3d 208 (8th Cir. 1995), cert. denied, No. 95-1619 (June 24, 1996), have also prevented devise or descent to a lineal descendant.

Congress's authority over the inheritance of Indian lands is particularly broad. In the specific context of Indian law, this Court has affirmed a decision upholding a statute that precluded lineal descendants of less than one-fourth Yakima blood from inheriting the restricted or trust estate of a decedent member of the Yakima Tribe. *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash 1965), aff'd, 384 U.S. 209 (1966). Although the focus of the district court's decision in *Simmons* was on Congress's authority to define tribal membership, the effect of the decision was the same as here: to preclude a decedent from passing property to his lineal descendants.

Indeed, the laws applicable to the inheritance of Indian lands have always been subject to change by Congress, even when those changes had very substantial effects on the disposition of property after the death of a decedent. As this Court explained in *Jefferson* v. *Fink*, 247 U.S. 288, 290 (1918), "[i]n early

times * * * it was held that while the tribal relation continued the applicable rule of descent was to be found in the laws and usages of the tribe." See also *Jones* v. *Meehan*, 175 U.S. 1, 19-32 (1899). Later, Congress altered that rule to make applicable the inheritance laws of the State or territory in which the land lay. *Jefferson* v. *Fink*, 247 U.S. at 290. As the Court recognized in *Jefferson*, however, "[l]ike other rules of descent," the rules applicable to devise and descent of Indian lands are "subject to change by the law-making power as to any land not already passed to the heir by the death of the owner." *Id.* at 294. Similarly, the General Allotment Act originally precluded devise and provided that allotments held in trust could pass only by descent in accordance with state or territorial law. § 5, 24 Stat. 389; see 25 U.S.C. 348. It was only 20 years later that Congress first granted allottees the right to pass property by devise. Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373.

When Congress enacted Section 207, it once again altered the law governing descent and devise of minor fractional interests, in effect making a single federal rule of descent—and a limitation on the right of devise—applicable to minor interests in Indian trust lands. In light of the limited nature of the intrusion on property rights, the close tailoring of the remedy in the amended Section 207 to the scope of the Indian heirship problem, and the long-standing principles granting the sovereign broad authority to alter the rules of inheritance, it cannot be said that Section 207 is the kind of extraordinary and unreasonable restriction that "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415.

III. THE AMENDED ACT IS IN ANY EVENT CONSTITUTIONAL AS APPLIED IN CASES OF INTESTATE SUCCESSION OR CASES IN WHICH A DEVISE WOULD EXACERBATE THE FRACTIONATION OF INDIAN LAND

Even if the amended Section 207 posed a constitutional problem under the Just Compensation Clause as applied to cases like this, in which the decedent died with a will that devised his minor fractional interests to his children without further fractionating those interests, it would pose no such problems in cases in which the decedent left a will that attempted to further fractionate the decedent's minor ownership interests or in cases in which the decedent died intestate. As applied in such cases, the amended Section 207 should be recognized as constitutional. Cf. *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1018 (1995).

First, even if the amended Section 207 continues to pose difficulties in cases like the present, it would not do so in cases in which the decedent dies intestate. Faced with the "serious public problem," *Hodel* v. *Irving*, 481 U.S. at 718, caused by the extreme fractionation of Indian lands, Congress reasonably can put landowners on notice that their ownership interests will not be further fractionated by operation of law and that some affirmative action by the owner is necessary to avoid escheat. As we noted above, moreover, there is every reason to suppose that Congress's specification of the tribe as the statutory heir of minor fractional interests accords with the wishes of many decedents who die intestate and therefore never state any intention to the contrary. See note 13, *supra*. To hold the Act unconstitutional in those

contexts threatens to upset—rather than fulfill—the expectations of decedents, without serving any substantial public purpose. This Court stated in *Hodel* v. *Irving* that "[i]t may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe." 481 U.S. at 718. Since Section 207 would have only that effect in many cases, it is constitutional as applied in those cases.

It is true that three of the four decedents in *Hodel* v. *Irving* itself died intestate, yet the Court nonetheless held the Act unconstitutional as applied to all four. In *Hodel* v. *Irving*, however, no argument was made that the Act's constitutionality should be assessed as applied to different categories of decedents, and the Court gave no indication that it had considered the possibility of ruling on the constitutionality of the Act based on an as-applied, rather than a facial, analysis. Moreover, because the unamended Section 207 was challenged so soon after it was enacted, see 481 U.S. at 728-733 (Stevens, J., concurring in the judgment), there was little possibility that the intestate decedents in *Hodel* v. *Irving* had had any opportunity to plan their estates or develop any particular expectation regarding how their minor fractional interests in trust lands would be disposed of upon their death. Where, however, an intestate decedent has had the time to develop such an expectation under the amended Section 207, there is no basis to upset that expectation by refusing to give effect to the amended Act as applied to such decedents. Accordingly, even if the amended Section 207 were unconstitutional as applied to decedents such as William Youpee in this case, it would remain

constitutional as applied to the estate of intestate decedents.

Second, Section 207 also operates to prevent devise of any single minor fractional interest to more than one individual. This Court stated in *Hodel* v. *Irving* that "[s]urely it is permissible for the United States to prevent the owners of such [minor fractional] interests from further subdividing them among future heirs on pain of escheat." 481 U.S. at 718. Therefore, in cases in which Section 207, as applied, has only that effect, it is a constitutional response to the extraordinary problems caused by the extreme fractionation of Indian lands.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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